2005

Orem City v. Bradley W. Creer : Brief of Appellant

Utah Court of Appeals

Michael G. Barker; attorney for appellee.
Stephen Quesenberry, D. Scott Davis; Hill, Johnson & Schmutz; attorneys for appellant.

IN THE UTAH COURT OF APPEALS

OREM CITY, Appellee/Plaintiff, vs. BRADLEY W. CREER, Appellant/Defendant.	**BRIEF OF APPELLANT** Trial Court Case No. 051200231 Appellate Case No. 20051065-CA

Appeal From the Fourth Judicial District Court, Orem Department,
Utah County, State of Utah
The Honorable John C. Backlund

Michael G. Barker (6475)
Orem City Attorney
56 North State Street
Orem, Utah 84057
Attorneys for Appellee/Plaintiff

Stephen Quesenberry (8073)
D. Scott Davis (8934)
HILL, JOHNSON & SCHMUTZ, L.C.
3319 North University Ave.
Provo, UT 84604
Attorneys for Appellant/Defendant

APPELLANT REQUESTS ORAL ARGUMENT AND A PUBLISHED DECISION

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LIST OF PARTIES

Appellee/Plaintiff

Orem City

Appellant/Defendant

Bradley W. Creer

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B. Statutes and Rules

I. STATEMENT OF JURISDICTION

This Court has jurisdiction to hear this appeal pursuant to Utah Code Ann. 78-2a-3(2)(e).

II. STATEMENT OF ISSUES AND STANDARD OF REVIEW

A. There was insufficient evidence in the record to support a conviction on the Theft of Services charge.

1. Standard of Review: The standard of review for a sufficiency of evidence claim is highly deferential to a jury verdict. *State v. McClain*, 706 P.2d 603, 605 (Utah 1985). The appellate court reviews "the evidence and all inferences which may be reasonably drawn from it in the light most favorable to the verdict." *State v. Shumway*, 2002 UT 124, ¶ 15, 63 P.3d 94 (citing *State v. Petree*, 659 P.2d 443, 444 (Utah 1983)). An appellate court will reverse a jury verdict for insufficient evidence only if it determines that "reasonable minds could not have reached the verdict." *State v. Widdison*, 2001 UT 60, ¶ 74, 28 P.3d 1278 (citing *State v. Colwell*, 2000 UT 8, ¶ 40, 994 P.2d 177).

B. The trial court erred in refusing to give certain jury instructions requested by the Defendant regarding the Theft of Services charge, including that mere failure to pay is insufficient to support a conviction, fraudulent intent is required to be proven in order to support a conviction, and a person cannot be convicted of theft of services if there is evidence of intent to pay for the services. R. 81-97, T. 195-203.

1. Standard of Review: Whether a trial court's refusal to give a proposed jury instruction constitutes error is a question of law, which is reviewed for correctness. *State v. Spillers*, 2005 UT. App. 283 ¶13, *State v. Hamilton*, 827 P.2d 232, 238 (Utah 1992).

C. The trial court erred in excluding proffered testimony of Tracy Gillman as hearsay (despite concession from prosecutor that proffered testimony qualified as an exception to the hearsay rule as a present sense impression and an excited utterance under Utah Rules of Evidence 803(1) and (2)). T. 170-172. The trial court's exclusion of the proffered testimony denied and deprived the Defendant of presenting exculpatory evidence regarding the Interference with Arresting Officer charge.

1. Standard of Review: The standard of review on the admissibility of hearsay evidence is complex, since the determination of admissibility "often contains a number of rulings, each of which may require a different standard of review." Norman H. Jackson, Utah Standards of Appellate Review, 12 Utah Bar J. 8, 38 (1999). The appellate court reviews the legal questions to make the determination of admissibility for correctness. *Hansen v. Heath*, 852 P.2d 977, 979 (Utah 1993). The appellate court reviews questions of fact for clear error. *State v. Parker*, 2000 UT 51, ¶ 13, 4 P.3d 778. The appellate court reviews the district court's ruling on admissibility of hearsay for abuse of discretion. *Eggett v. Wasatch Energy Corp.*, 2004 UT 28, ¶ 10, 94 P.3d 193.

III. DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

76-6-409. Theft of services.

(1) A person commits theft if he obtains services which he knows are available only for compensation by deception, threat, force, or any other means designed to avoid the

due payment for them.

(2) A person commits theft if, having control over the disposition of services of another, to which he knows he is not entitled, he diverts the services to his own benefit or to the benefit of another who he knows is not entitled to them.

(3) In this section "services" includes, but is not limited to, labor, professional service, public utility and transportation services, restaurant, hotel, motel, tourist cabin, rooming house, and like accommodations, the supplying of equipment, tools, vehicles, or trailers for temporary use, telephone or telegraph service, steam, admission to entertainment, exhibitions, sporting events, or other events for which a charge is made.

(4) Under this section "services" includes gas, electricity, water, sewer, or cable television services, only if the services are obtained by threat, force, or a form of deception not described in Section **76-6-409.3**.

(5) Under this section "services" includes telephone services only if the services are obtained by threat, force, or a form of deception not described in Sections **76-6-409.5** through **76-6-409.9**.

76-8-305. Interference with arresting officer.

A person is guilty of a class B misdemeanor if he has knowledge. or by the exercise of reasonable care should have knowledge, that a peace officer is seeking to effect a lawful arrest or detention of that person or another and interferes with the arrest or detention by:

(1) use of force or any weapon;

(2) the arrested person's refusal to perform any act required by lawful order:

(a) necessary to effect the arrest or detention; and

(b) made by a peace officer involved in the arrest or detention; or

(3) the arrested person's or another person's refusal to refrain from performing any act that would impede the arrest or detention.

76-1-501. Presumption of innocence -- "Element of the offense" defined.

(1) A defendant in a criminal proceeding is presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt. In absence of such proof, the defendant shall be acquitted.

(2) As used in this part the words "element of the offense" mean:

(a) The conduct, attendant circumstances, or results of conduct proscribed, prohibited, or forbidden in the definition of the offense;

(b) The culpable mental state required.

(3) The existence of jurisdiction and venue are not elements of the offense but shall be established by a preponderance of the evidence.

Utah Rule of Evidence 401. Definition of "relevant evidence."

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Utah Rule of Evidence 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissible.

Utah Rule of Evidence 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Utah Rule of Evidence 803(1) and (2). Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.
(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

IV. STATEMENT OF THE CASE

A. Nature of the Case

This is a criminal case in which the appellant, Bradley W. Creer, was charged with and convicted of Theft of Services, in violation of Utah Code 76-6-409, and Interference with Arresting Officer, in violation of Utah Code 76-8-305, arising out of an incident occurring at Utah Valley State College, in Orem, Utah, on January 28, 2005. R. 1, 12.

B. Relevant Facts [1]

On January 28, 2005, the Utah High School Association state drill team championships were being held at the McKay Events Center on the campus of Utah Valley State College (hereafter "UVSC"). T. 14, 41, 67, 113, 119, 131, 135-136, 167, 180. Mr. Creer's, daughter was participating in the event. T. 136, 180.

Mr. Creer entered the events center at the main entrance on the Northwest corner of the building. T. 15-16, 19, 44. Mr. Creer entered the McKay Events Center at UVSC without a ticket. T. 19-20. He was confused, as were others, about where to obtain a ticket. A staff person testified there were signs indicating where to buy at ticket, other witnesses indicated that there were no signs and/or that it was not clear where tickets were to be purchased. T. 17-19, 125, 128, 137, 140, 152-153, 177-178, 192-194.

Upon entering the Events Center, there is a foyer that circles the enclosed arena. T. 94. Mr. Creer entered this area and, not seeing anyone taking tickets in the entry way, inside the foyer, or at the doors leading into the arena, then entered the arena on the upper level. T. 136, 138-139. Upon entering the arena, a staff person asked Mr. Creer if he had a ticket, or evidence that he purchased a ticket, and he stated that he did not. T. 19-20,

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[1] The evidence regarding the charges and convictions is marshaled from the trial testimony contained in the transcript, and cited as "T." followed by the page numbers in the transcript where the testimony is found. Only two witnesses, besides Mr. Creer, testified about and observed his brief entry inside the arena and all their testimony is marshaled herein.. All other witness testimony pertains primarily to Mr. Creer's interaction with the police/security officers, with the exception of Michelle Creer who created a video tape the following day demonstrating the lack of signs about where to pay for admission into the event (which was still going on).

140, 154. Mr. Creer told the staff person, and later a police officer, that he needed to get some money from his wife in order to get a ticket. T. 20, 86-87, 97, 141. He called his wife, who was already at the event, and asked her to meet him by the ticket gate to pay for his ticket (he had no money with him). T. 141-143. Mr. Creer briefly walked forward into the arena while talking with his wife to see if he could locate where she was sitting. T. 22, 141-142. While Mr. Creer was on the phone with his wife, the staff person called security. T. 22, 36. After arranging to meet his wife to obtain money to buy a ticket, Mr. Creer then attempted to go back outside the facility. T. 23, 132, 143-144, 158-159. Two UVSC security/police officers confronted him as he was attempting to leave the building. T. 96, 143-145, 158-159. Mr. Creer explained to one of the officers that he was on his way to obtain money from his wife to buy a ticket for admission to the event. T. 86-87, 97.

Prosecution witnesses testified that Mr. Creer was asked a number of times by a security/police officer to keep his hands out of his pockets, and for identification. T. 27, 29, 49-50, 71, 79, 87-89. Some of the prosecution witnesses testified that Mr. Creer was upset and/or agitated. T. 50, 71-72, 87. Each of the prosecution witnesses testified that Mr. Creer resisted being taken into custody. T. 30, 53, 73, 91-92. Mr. Creer testified that he was asked for identification, but did not recall being asked to keep his hands out of his pockets. T. 145, 159-60, 164-65. None of the defense witnesses testified that Mr. Creer was upset or agitated, or that he resisted in any way. T. 121-122, 124, 126-127, 132-133, 145-148, 159-160, 162-166, 169, 173-174.

Within a very short time of contacting Mr. Creer, the two security/police officers grabbed Mr. Creer and forcibly took him to the ground, causing Mr. Creer to violently hit his head on the floor hard enough to cut it and to produce significant bleeding, and tased him several times. T. 54-56, 57, 73, 79-80, 91-92, 104-05, 121-22, 126-27, 132-133, 146-47, 160-62, 169-70, 173-74. Mr. Creer was then removed from the premises, and eventually charged with/cited for Theft of Services and Interference with Arresting Officer. T. 147, 149, R. 1-2, 12.

C. Course of Proceedings

A jury trial was held on October 27, 2005. R. 99-102, 112. Mr. Creer appeals the verdicts/convictions arising out of the trial. R. 99-102, T. 205-206.

During the trial, as a witness was testifying regarding the interference with arresting officer charge, the trial court interrupted the witness who was about to relate an excited utterance and/or a present sense impression made by a bystander. T. 170. The prosecutor did not object to the testimony and conceded that it qualified as a present sense impression. T. 170. The defense proffered that shortly after the police/security officers suddenly and violently took Mr. Creer to the floor, the witness heard an unidentified person standing next to her exclaim, "The guy did not do anything wrong. At first I saw them frisk his pockets. Then the next thing I knew, they were jumping on him. He didn't resist, talk back or anything." T. 171. Despite objection from defense counsel, the trial court excluded the witness' testimony as hearsay. T. 170-172.

At the conclusion of the presentation of the evidence, the jury was excused and the trial court and counsel discussed jury instructions. T. 195-203. Regarding the Theft of Services charge, defense counsel requested an instruction based on *State v. Leonard*, 707 P.2d 650,655 (Utah 1985), that a showing of fraudulent intent is required to support a conviction. T. 197-198. Likewise, the defense argued that the trial court should have instructed the jury that if the defendant in good faith received services for which he intended to pay, he could not be convicted of theft of services. T. 197. The trial court denied the jury instructions requested by the defense, and did not include the requested instructions in the instructions given to the jury. T. 202-203, R. 81-97.

D. Disposition at Trial Court

The jury returned verdicts of guilty on both counts, R. 79-80, T. 206-026, and the trial court sentenced Mr. Creer to a term of 180 days, suspended, fined Mr. Creer $1,000.00, plus a $93.92 surcharge on each count, suspended all but $175.00 on each count, and placed Mr. Creer on probation to be supervised by the court for 12 months. R. 105-107.

V. SUMMARY OF ARGUMENT

There was insufficient evidence to convict Mr. Creer of theft of services because he did not obtain or receive the service being provided, and because he did not seek to avoid payment for any service. In fact, he had arranged to obtain the money to gain admission into the event.

The trial court refused/failed to give instructions requested by the defense regarding the theft of services charge. The requested instructions were that mere failure to pay was not sufficient to support a conviction, and that the prosecution was required to prove fraudulent intent. The defense presented controlling authority for the requested instructions, nevertheless the trial court refused/failed to give them.

The trial court erred in excluding evidence/testimony proffered by the defense that qualified as present sense impressions and/or excited utterances, prejudicing and hampering the Defendant's/Appellant's right and ability to present evidence to refute and challenge prosecution witnesses, to corroborate his own testimony, and to attempt to prove his innocence regarding the interference with arresting officer charge.

VI. ARGUMENT

A. There was insufficient evidence to convict Mr. Creer of Theft of Services.

Utah Code 76-6-409 sets forth the crime and elements of Theft of Services. It provides:

> (1) A person commits theft if he obtains services which he knows are available only for compensation by deception, threat, force, or any other means designed to avoid the due payment for them.
>
> (2) A person commits theft if, having control over the disposition of services of another, to which he knows he is not entitled, he diverts the services to his own benefit or to the benefit of another who he knows is not entitled to them.
>
> (3) In this section "services" includes, but is not limited to, labor, professional service, public utility and transportation services, restaurant, hotel, motel, tourist cabin, rooming house, and like accommodations, the supplying of equipment, tools, vehicles, or trailers for temporary use, telephone or telegraph service, steam, admission to entertainment, exhibitions, sporting events, or other events for which a charge is made.
>
> (4) Under this section "services" includes gas, electricity, water, sewer, or cable television services, only if the services are obtained by threat, force, or a form of

deception not described in Section 76-6-409.3.

(5) Under this section "services" includes telephone services only if the services are obtained by threat, force, or a form of deception not described in Sections 76-6-409.5 through 76-6-409.9.

Under the facts and evidence in this case, Mr. Creer did not commit the crime of Theft of Services.

The first issue is whether Mr. Creer obtained services. As defined in the statute, the "services" in this case would be "admission to entertainment, exhibitions, sporting events, or other events for which a charge is made." U.C.A. 76-6-409(3). It is undisputed that the event taking place on January 28, 2005, at the McKay Events Center on the campus of Utah Valley State College, was the Utah High School Association state drill team championships. T. 14, 41, 67, 113, 119, 131, 135-136, 167, 180. It is likewise undisputed that Mr. Creer never entered the arena to watch the competition, and never actually saw or watched the competition. He entered very briefly, while talking with his wife, to see if he could see her and arrange to obtain the money to pay for a ticket. T. 141-143. Because Mr. Creer never obtained services, he cannot be convicted of the crime of Theft of Services, and his conviction for that offense must be reversed.

The second issue, asssuming *arguendo* that Mr. Creer's brief entry into the arena to see if he could see his wife somehow constituted receipt of some "service," is whether Mr. Creer did so "by deception, threat, force, or any other means *designed to avoid the due payment for them*." U.C.A. 76-6-409(1) (emphasis added). Mr. Creer did not try to avoid payment for entry into the arena by deception, threat, force or any other means. He

had every intent of paying to enter the arena, had the ability to pay, and made arrangements to do so. T. 20-22, 86, 97, 141-143, 151.

The Utah Supreme Court has established that "[the] statute requires the prosecution prove fraudulent intent by more than just a mere failure to pay." *State v. Leonard*, 707 P.2d 650, 655 (Utah 1985).[2] The Court explained that fraudulent intent is the essence of the crime of theft of services, because without proof of criminal intent the law would require imprisonment "for mere failure to pay a debt." *Id.*, at 654. The Court further explained that a person cannot be convicted of theft of services when he or she plans to pay later for the services. *Id.*

Here, it cannot be disputed that Mr. Creer had no intent, and made no effort, to avoid paying for admission to the event, and that he had made arrangements with his wife to obtain the money to do so.

The trial court refused/failed to instruct the jury, as requested by the defense, according to the controlling authority set forth in *Leonard*. Had the jury been properly instructed that evidence of mere failure to pay is insufficient to support a conviction, that the prosecution was required to prove fraudulent intent, and that a person cannot be convicted of theft of services if he or she planned to pay later for the services, Mr. Creer submits that the jury, based on the evidence presented, could not have reasonably convicted him of theft of services. *State v. Widdison*, 2001 UT 60, ¶ 74, 28 P.3d 1278.

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[2] The wording of the statute at issue in *Leonard*, U.C.A. 76-6-409(1), reads exactly as the current version. Cf., *Leonard*, at 654, and U.C.A. 76-6-409(1) as amended.

Again, because Mr. Creer obtained no services, and there is no evidence that he intended or attempted to avoid paying for admission to the event, his conviction for theft of services must be reversed.

B. The trial court erred in failing/refusing to instruct the jury regarding the requisite intent required to support a conviction for Theft of Services.

Mr. Creer requested the trial court to instruct the jury that the prosecution was required to prove more than mere failure to pay, and to prove fraudulent intent, and that a person could not be convicted of theft of services if he or she planned to pay later for the services. T. 196-198. The defense pointed out that the Utah Supreme Court ruled, in the *Leonard* case, that a jury should be so instructed. T. 197.

The prosecutor objected to the proposed instruction, arguing the last amendment to the statute was in 1994, and he did not know how the statute read in 1985. T. 201-202. The trial court agreed, stating:

> And I just think that is relevant, dealing with what we have here. So those two instructions would read[,] "The prosecution is required to show more than mere failure to pay. Additional evidence is needed to show a fraudulent intent."
>
> The problem with that I think is that it is directing a jury that they first have to show fraudulent intent, and then what percent and more. Well, they have to look for failure to pay, and then show fraudulent intent, which I don't think the statute requires anymore.

T. 202. The trial court did not allow the requested instructions. R. 81-97.

The prosecutor and the trial court were wrong in assuming that the language of the statute (76-6-409(1)) had changed between the *Leonard* decision in 1985 and the latest amendment in 1994, or the current version of the statute. In fact, the statute reads exactly

the same, was not affected by the 1994 amendment, and the reasoning and holding in the *Leonard* case is still applicable and controlling.

It cannot be credibly argued that had the jury been instructed that mere failure to pay is not enough to support a conviction, and that the prosecution was required to prove fraudulent intent, that their verdict on the theft of services charge would have been unchanged. There was substantial and uncontradicted evidence that Mr. Creer had every intent of paying and had made arrangements to do so. Therefore, it cannot be argued that the trial court's failure/refusal to give the requested instruction was harmless. Accordingly, Mr. Creer's conviction for theft of services should be reversed based on the trial court's failure or refusal to give the requested instruction -- an instruction the Utah Supreme Court has ruled is required. See *Leonard*, at 655.

C. The trial court erred in excluding, as hearsay, proffered testimony which qualified as an excited utterance or present sense impression, thereby denying and depriving the defense of providing exculpatory evidence regarding the interference with arresting officer charge.

During the trial, the defense presented Tracy Gillman as a witness who observed some of the interaction between Mr. Creer and the UVSC security/police officers, and who heard an exclamation from an identified witness. T. 167-176. As she was about to relate what the unidentified witness exclaimed, the trial court, *sua sponte*, interjected, and the following discussion ensued:

Court: "I think she's about to give us some hearsay here, so --"

Defense Counsel: "Is there an objection?"

Court: "Well, it would be hearsay."

Prosecutor: "Well, actually I think it would be a present sense in questioning as well."

Court: "Well, it's somebody we don't even know. I mean, it's one thing to do an excited utterance (inaudible) present sense (inaudible) to interview a witness to an accident, but it's a -- but there is a lady there -- that nobody even knows. No, I'm not going to allow it."

Defense Counsel: "Could I just make a record, then, please of what -- is there any way I can take this outside the presence of the jury. This is really important, and I'd like to make a detailed record."

The jury is excused.

Defense Counsel: "When a witness describes a state -- this is the Rule -- Utah Rule of Evidence 801 -- 803(1), 'Another person's statement describing or explaining an event or a condition named (sic - (should be "made")) while the declarant --' which is the person she's talking about --"

Court: "Right."

Defense Counsel: --"'was perceiving the event or condition or immediately thereafter.' It is not hearsay. She will testify that standing there, a person in the crowd next to her, who obviously she's not going to know her name, said, 'The guy did not do anything wrong. At first I saw them frisk his pockets. Then the next thing I knew, they were jumping on him. He didn't resist, talk back or anything.'"

Court: "This is more than a presence (sic) sense of (inaudible) or excited utterance. It's a variable in what happened. So I'm not going to allow it."

Defense Counsel: "Okay."

Court: "You've made your proffer. It's on the record, and the Court excludes. It is not an excited utterance (inaudible)."

Defense Counsel: "It's absolutely a presence (sic) sense impression. It absolutely is."

Court: "Well, you've got your -- you've got it on the record, and I'm not going to allow it. Okay. Please invite the jury to come back in."

T. 170-172.

Utah Rule of Evidence 803(1) and (2) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> (1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.
> (2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

The proffered statements sought to be admitted through Tracy Gillman qualify as both present sense impressions and excited utterances.

The proffered statements were made while the declarant was perceiving the interaction between the officers and Mr. Creer, thus qualifying as a present sense impression. The statements related a startling event and were made while the declarant

was under the stress of the excitement cause by the event, hence they would also be admissible as excited utterances.

A three-pronged test is used to determine if a statement qualifies as an excited utterance: (1) a startling event or condition occurred, (2) the statement was made while the declarant was under the stress of excitement caused by the event or condition, and (3) the statement relates to the startling event or condition. *West Valley City v. Hutto*, 5 P.3d 1, 4-5 (Ut.App. 2000).

Regarding excited utterances, this court explained:

> Rule 803(2) recognizes an exception to the usual rule against admitting hearsay for "statements relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition," whether or not the declarant is available to testify at trial. . . . The reasoning is simple: the stress and excitement of the event suppress the declarant's ability to reflect or calculate self interest in a manner that would produce a lie. . . . Lacking the "wherewithal to fabricate a falsehood, 'the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous.'"
>
> The classic example of an excited utterance is a witness's exact recollection of the declarant's spontaneous "sound bite"---an uncoached blurting out---made while the declarant observed the exciting event or closely thereafter.

Id., at 4 (citations omitted). The facts here meet exactly the "classic example" utilized by the court. The witness remembered exactly the declarant's spontaneous, uncoached blurting statement made while declarant observed the exciting event.

The statements proffered to the trial court in this matter satisfy the three-prong test and the legal reasoning for allowing such statements set forth in the *Hutto* case. The trial court's exclusion of the proffered statements deprived Mr. Creer of refuting and challenging the prosecution's witnesses that he refused to comply with the officer's

commands or resisted in any way their efforts to detain or question him, and to corroborate his testimony that he did not refuse to comply with the officer's directions. The trial court's exclusion of these admissible statements essentially dispossessed Mr. Creer of the opportunity to present evidence regarding his innocence of and defense to the Interference with Arresting Officer charge.

The proffered statements qualify as present sense impressions and excited utterances under Utah Rule of Evidence 803 (1) and (2). The trial court not only abused its discretion in excluding the statements, but also deprived Mr. Creer from presenting exculpatory evidence regarding the interference charge. Accordingly, the conviction for Interference with Arresting Officer must reversed and remanded to the trial court to allow Mr. Creer to present the improperly excluded evidence.

VII. CONCLUSION

Based on the foregoing, the Defendant/Appellant, Bradley W. Creer, respectfully requests this Court to reverse the convictions for theft of services and interference with arresting officer entered on October 27, 2005 in the Fourth Judicial District Court, Orem Department.

RESPECTFULLY SUBMITTED this 17 day of May, 2006.

HILL, JOHNSON & SCHMUTZ, LC

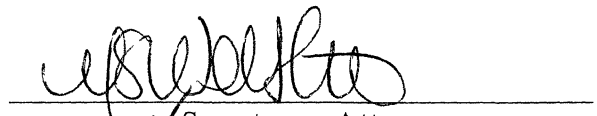
Stephen E. Quesenberry
D. Scott Davis
Attorneys for Defendant/Appellant
Bradley W. Creer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I personally served a true and correct copy of the foregoing Brief of Appellant on this 12 day of May, 2006, to the following

Michael G. Barker
Orem City Attorney's Office
56 North State Street
Orem, Utah 84057

Sent via:
___Hand-Delivery
___Facsimile
_✓_Mailed (U.S. Mail, postage prepaid)
__Other _____



✓Secretary__Attorney

VIII. ADDENDUM

Exhibit A ..... Minutes Sentence, Judgment, Commitment

EXHIBIT "A"

4TH DISTRICT COURT - OREM COURT
UTAH COUNTY, STATE OF UTAH

OREM CITY, Plaintiff,	:	MINUTES SENTENCE, JUDGMENT, COMMITMENT
vs.	:	Case No: 051200231 MO
BRADLEY WILLIAM CREER, Defendant.	:	Judge: JOHN C. BACKLUND Date: November 8, 2005

PRESENT
Clerk: tashap
Prosecutor: BARKER, MICHAEL G
Defendant
Defendant's Attorney(s): QUESENBERRY, STEPHEN

DEFENDANT INFORMATION
Date of birth: December 25, 1961
Audio
Tape Number: 108 Tape Count: 10.08

CHARGES

1. THEFT OF SERVICES - Class B Misdemeanor
   Plea: Not Guilty - Disposition: 10/27/2005 Guilty
2. INTERFERING W/ LEGAL ARREST - Class B Misdemeanor
   Plea: Not Guilty - Disposition: 10/27/2005 Guilty

SENTENCE JAIL

Based on the defendant's conviction of THEFT OF SERVICES a Class B Misdemeanor, the defendant is sentenced to a term of 180 day(s) The total time suspended for this charge is 180 day(s).
Based on the defendant's conviction of INTERFERING W/ LEGAL ARREST a Class B Misdemeanor, the defendant is sentenced to a term of 180 day(s) The total time suspended for this charge is 180 day(s).

Case No: 051200231
Date: Nov 08, 2005

SENTENCE FINE

Charge # 1	Fine:	$1000.00
	Suspended:	$825.00
	Surcharge:	$93.92
	Due:	$175.00
Charge # 2	Fine:	$1000.00
	Suspended:	$825.00
	Surcharge:	$93.92
	Due:	$175.00
	Total Fine:	$2000.00
	Total Suspended:	$1650.00
	Total Surcharge:	$187.84
	Total Principal Due:	$350.00
		Plus Interest

The fine is to be paid in full by 04/15/2006.

ORDER OF PROBATION

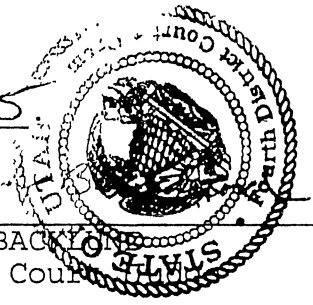
The defendant is placed on probation for 12 month(s).
Probation is to be supervised by Court Probation.
Defendant is to pay a fine of 350.00 which includes the surcharge.
Interest may increase the final amount due.
Pay fine on or before April 15, 2006.
Pay fine to The Court.

PROBATION CONDITIONS

Violate no laws
Keep address current with the court.
Pay fines and fees as ordered.
Appear when requested.

Case No: 051200231
Date: Nov 08, 2005

Dated this 8 day of Nov, 2005.



JOHN C. BACKLUND
District Court Judge